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## THE PHYSICIAN AS AN EXPERT

### PART II.

**T**HE competency of a physician to testify as to facts simply and also in the capacity of an expert is, at the present time, very largely affected by statutes that have in view the protection from disclosure of confidential communications between physician and patient. The common law affords no such protection.<sup>1</sup> By the common law, a physician is not incompetent to give his professional opinion based upon facts learned by him while attending a patient professionally. This freedom in regard to disclosure has been severely criticised, and there is certainly much to be said in favor of the statutory changes by which the common law rule has been practically abrogated in many of the states. This legislation has been prompted by the feeling that between physician and patient there should be the fullest confidence, and that this can be secured only by according to the patient a very large degree of protection in regard to communications made by him to his medical adviser as a basis for the proper treatment of his case. The wording of the statutes of different states upon the subject varies somewhat, but there is a sufficient similarity in the legislation, as will be seen by consulting the references in the next note, to admit of a general discussion of the changes introduced and of the constructions that have been put upon the statutes by the courts. The New York statute may be taken as a type. It provides that "a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."<sup>2</sup> The restriction in North Carolina is different from that usually found in that the statute provides that the presiding judge of a superior court may compel a disclosure whenever in his opinion the same is necessary to the proper administration of justice.

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<sup>1</sup> 1 Greenleaf on Evidence (16th ed.) § 247a and cases cited.

<sup>2</sup> 1 Stover's New York Ann. Code of Civil Procedure (1902), § 834. The Michigan statute is substantially the same. 3 Mich. Comp. Laws (1897), § 10181. The Nebraska statute provides that a physician shall not be allowed "in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity" and necessary to enable him to discharge his duties. Comp. Statutes of Neb. (1901), 1295, Sec. 333. The Iowa provision is essentially the same. Ann. Code of Iowa (1897), Sec. 4608. In Nevada it is pro-

This legislation does not, as a rule, exclude communications made to the unlicensed practitioner. The statutes usually mention "licensed physicians or surgeons" or "persons duly authorized to practice physic or surgery," as those who are not allowed to disclose information acquired while attending patients.<sup>1</sup> It is suggested in the case cited below<sup>1</sup> that if persons not legally author-

vided that "a licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." *Comp. Laws of Nev.* (1861-1900), 3479, § 384. Substantially similar language is used in the Colorado, Oregon and Washington statutes, but in the last two states the restriction is confined to civil actions. 2 *Mills' Ann. Statutes of Col.* (1891), § 4824:4; 1 *Hill's Ann. Laws of Oregon* (1892), §§ 712:4, 2 *Hill's Ann. Statutes and Codes of Wash.* (1891), § 1649:4. In the Dakotas the provision is that the physician "cannot without the consent of his patient, be examined," etc., the restriction in South Dakota being confined to civil actions. *Revised Codes of So. Dak.* (1903), 958, § 538:3; *Revised Codes of N. Dak.* (1899), § 5703:3. In California the provision is that "a physician or surgeon, or the assistant of either of them, cannot, without the consent of the patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable the physician or surgeon to prescribe or act for the patient." *Cal. Code of Civil Procedure* (1901), § 1881:4. The statutes upon the subject in Idaho, Minnesota and Arizona are substantially the same as the foregoing, excepting that they do not extend to the assistant of the physician or surgeon. *Idaho Code of Civil Procedure* (1901), § 4406:4; *Statutes of Minn.* (1894), § 5662:4; *Revised Statutes of Arizona, Penal Code* (1901), §§ 1111-4. In each of these states the restriction is confined to civil actions, but in Arizona it applies to both civil and criminal. The statutes upon the subject in Ohio and Wyoming are the same, and provide that a physician "shall not testify . . . concerning a communication made to him by his patient in that relation, or his advice to his patient." 2 *Bates' Ann. Ohio Statutes* (4th ed.) § 5241; *Revised Statutes of Wyoming* (1899), § 3682. In Indiana it is provided that physicians shall not be competent witnesses "as to matter communicated to them as such, by patients, in the course of their professional business, or advice given in such cases." 1 *Burns' Ann. Ind. Statutes* (1901), § 505:4. In Kansas, a physician or surgeon is incompetent to testify "concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient." *Dassler's General Statutes of Kans.* (1901), § 4771:6. In Missouri, a physician or surgeon is incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." 1 *Revised Statutes of Mo.* (1899), § 4659. The statutes in Arkansas and Wisconsin are the same as the statute in Missouri, excepting that they provide that the physician or surgeon shall not be compelled to disclose any information, etc. *Digest of the Statutes of Ark.* (1894), § 2919; 2 *Wisconsin Statutes* (1898), § 4075. In Pennsylvania the restriction is confined to the civil action and to such disclosures as "shall tend to blacken the character of the patient." *Brightly's Digest of Laws of Penn.* (1893-1903), pp. 249, 250. The restriction of the statute in Arkansas extends to the trained nurse. *Acts of Ark.* (1899), Act. 31, p. 38.

<sup>1</sup> *Wiel v. Cowles*, 45 *Hun.* (52 *N. Y. Sup. Ct.*) 307.

ized to practice, were held to be within the statute, the effect would be to extend the privileges of the statute to nurses and other persons who might be willing to swear that they were physicians in fact, and as such were attending the patient. But in the absence of a provision referring to legally authorized physicians as the persons who are to be bound by the statute, the spirit of the legislation would seem to be sufficiently liberal to bring within the protection of the statute communications made to an unauthorized practitioner, if he has been received by the patient and consulted as a physician, and has acted in that capacity, but no authority for the proposition has been discovered. In order that the statute may apply, the production of the license of the physician is not always necessary. It has been held that where the physician has testified that he is a regular practitioner, and attended the patient in that capacity, there being no further examination as to his authority, the patient is, on appeal, entitled to the benefit of the presumption that the physician had the license which the law requires. The court suggests that if the privilege were the physician's, he might, upon objection made, be required to produce the best evidence of his authorization, but that the patient being entitled to the privilege, the presumption referred to should obtain, in the absence upon the trial of any objection to the sufficiency of the proof.<sup>1</sup>

The physician is not by this legislation made an incompetent witness, in the absence of the consent of the interested party, in regard to the condition of a person whom he may have examined, or in regard to the causes of that condition, unless, at the time of the examination, the relation of physician and patient actually existed. In order that the physician may be incompetent to testify, he must have treated or advised professionally, at the time the information was received, the party who objects to his testimony; in other words, he must have come in contact with the party as a physician for the purpose of giving professional aid. And the burden is upon the party who seeks to exclude the offered evidence to show that it is within the inhibition of the statute. Referring to the New York statute upon the subject, the New York court of appeals says:—"When a party seeks to exclude evidence under this section the burden is upon him to bring the case within its purview. He must make it appear, if it does not otherwise appear, that the information

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<sup>1</sup> *Record v. Village of Saratoga Springs*, 46 Hun. (53 N. Y. Sup. C.) 448.

which he seeks to exclude was such as the witness acquired in attending the patient in a professional capacity not only, but he must also show that it was such as was necessary to enable him to act in that capacity."<sup>1</sup>

But in order that the relation of physician and patient may arise to such an extent as will exclude the testimony of the physician, it is not a necessary prerequisite that the physician be engaged by the patient. If the physician actually treats, or prescribes for, the patient or gives advice concerning treatment, the relation contemplated by the statute exists, even though he has been summoned to the case by an attending physician, or by friends of the party, or by a stranger. In speaking upon this subject, the court of appeals of New York says:—"He (the expert offered) was called by the attending physician, and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient, or even by strangers about him, and the statute would be robbed of much of its virtue if a physician thus called were to be excluded from its provisions because . . . he was not employed by the patient, nor a contract relation created between him and the patient. To bring the case within the statute, it is sufficient that the person attended as a physician upon the patient, and obtained his information in that capacity."<sup>2</sup> If a railroad company, for example, in case of an accident to a passenger, sends a physician to see the injured person, and the physician has authority to treat such person, the relation of physician and patient exists, even though no actual professional service is rendered to the person. Indeed, it has been held that under such circumstances a presumption of the existence of the professional relation arises, and that the information obtained is secured for the purpose of enabling the physician to prescribe or act for the patient.<sup>3</sup> Whenever it appears that a physician has examined a

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<sup>1</sup> *People v. Schuyler*, 106 N. Y. 298, 304. See upon the general proposition that the relation of physician and patient must exist at the time the information of witness is received, *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 569; *People v. Murphy*, 101 N. Y. 126; *Renihan v. Dennin*, 103 N. Y. 573; *Jacobs v. Cross*, 19 Minn. 523.

<sup>2</sup> *Renihan v. Dennin*, 103 N. Y. 573, 578, 579. See also, *Grattan v. Metropolitan Life Ins. Co.*, 24 Hun. (31 N. Y. Sup. C. R.) 43; *Munz v. Salt Lake City R. Co.*, 25 Utah, 220, 70 Pac. Rep. 852.

<sup>3</sup> *Munz v. Salt Lake City R. Co.*, 25 Utah, 220, 70 Pac. Rep. 852.

person in order, among other things, that he may be enabled to prescribe for that person, his testimony as to the results of his examination will be incompetent, even though he has made the examination at the instance of a third party, who is responsible for the injury from which the person examined is suffering, and who sends the physician with a view of having him prepare himself to testify in regard to the injury. Although the physician may have been sent simply to gain information that would enable him to testify, he renders himself incompetent to speak as a witness in regard to the results of his examination, when it appears that he made the examination in part, at least, in order that he might prescribe for the person. The purpose of the visit becomes immaterial when it appears that the physician, as a matter of fact, really acted in a professional capacity, and was understood to be so acting by the party examined.<sup>1</sup> Some cases go farther. It has been held, for example, that where the attending physician calls in another physician, who is present at the examination of the patient, but who takes no part therein and does not prescribe for the patient, the visiting physician cannot disclose facts so learned if the patient objects.<sup>2</sup> That the consulting physician is within the inhibition of the statute, cannot be questioned.<sup>3</sup> And it makes no difference whether he is called in by the attending physician on his own motion, or because the friends of the patient advise that it be done. The privilege of the statute extends to communications between the attending physician and the consulting physician, so far as they are necessary to enable the latter properly to discharge his duty.<sup>4</sup> It may properly be mentioned in this connection that the partner of the attending physician cannot disclose privileged matter that he has learned from his business associate or from hearing consultations between the patient and that associate.<sup>5</sup>

The professional relation of physician and patient does not exist

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<sup>1</sup> *Freel v. Market Street Cable R'y Co.*, 97 Cal. 40; *Weitz v. The Mound City R'y Co.*, 53 Mo. App. 39; *People v. Murphy*, 101 N. Y. 126; *New York, Chicago & St. Louis R. Co. v. Mushrush*, 11 Ind. App. 192; *Raymond v. Burlington, Cedar Rapids & Northern R'y Co.*, 65 Iowa, 152; *Keist v. Chicago Great Western R. Co.*, 110 Iowa, 32.

<sup>2</sup> *Green v. Town of Nebagmain*, 113 Wis. 509, 89 N. W. Rep. 520.

<sup>3</sup> *Renihan v. Dennin*, 103 N. Y. 573.

<sup>4</sup> *Prader v. National Masonic Accident Association*, 95 Iowa, 149. See also, *State v. Smith*, 99 Iowa, 26, 61 Am. St. Rep. 219.

<sup>5</sup> *Aetna Life Ins. Co. v. Deming*, 123 Ind. 384, 390, 391, 24 N. E. Rep. 86.

in a way that would exclude, under the statute, the testimony of the physician, where an examination of a person is made with a view of gaining information in regard to his physical or mental condition, for some purpose other than the ordinary professional one, provided the person examined understands that the examination is not for treatment. For example, an examination by a physician of a prisoner, under the direction of the prosecuting officer, for the purpose of ascertaining his physical condition simply, the prisoner consenting to the examination, would not constitute the relation of physician and patient, and the physician would be competent to testify as to the results of such examination. In such a case there would be no confidential relations that it is the policy of the statute to protect.<sup>1</sup> Further, if a railroad company should send a physician to ascertain as to the extent of the injuries to a person, claimed to have been received through the negligence of the road, and he should examine such person, it being understood by the injured person that the examination was for information and not for treatment, the physician would be a competent witness in regard to facts and conclusions developed through the examination. An examination under such circumstances would not involve any relation contemplated by the statute.<sup>2</sup> But if the examination of the physician should be followed by professional advice or treatment, he would bring himself within the restrictions of the statute.<sup>3</sup> The physician, however, cannot always speak as a witness when he has examined an injured party simply for the purpose of preparing himself to testify. Where such party consults a physician and discloses to him his physical condition for the purpose of using the physician as a witness, the physician will be prohibited from testifying as to the knowledge gained through the examination, except with the consent of the injured party. An examination, under the circumstances suggested, even though not followed by professional advice or treatment, implies a confidential relation that certainly comes within the spirit of the legislation upon the subject. In a recent Iowa case, the plaintiff submitted himself for examination to a physician in order that he might use the physician as a witness upon the trial of an action for damages for personal injuries. The

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<sup>1</sup> *People v. Glover*, 71 Mich. 303; *State v. Height*, 117 Iowa, 650; *People v. Kemmler*, 119 N. Y. 580, 584, 585; *People v. Sliney*, 137 N. Y. 570.

<sup>2</sup> *Heath v. Broadway and Seventh Ave. R. Co.*, 57 N. Y. Super. Ct. 496.

<sup>3</sup> *Freel v. Market St. Cable R'y Co.*, 97 Cal. 40.

physician not being called for the plaintiff, was called for the defendant. The objection was made for the plaintiff that the physician could not testify under the statute which provides that no physician or surgeon "shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice."<sup>1</sup> In sustaining the objection, the supreme court says: "Counsel for appellant urge that this witness was not consulted as a physician with reference to the treatment of plaintiff, but only for the purpose of securing his testimony as a witness, and that therefore the statute does not apply to him. We are not referred to any authorities which make this distinction. It seems to us that whenever an injured party consults a physician as physician, and discloses to him his physical condition, and thus enables him to obtain information which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party."<sup>2</sup> But where an examination by a physician is the result of an agreement between the parties to the litigation that it may be made for the purpose of obtaining the testimony of the physician, the objection that the information so gained is privileged, cannot prevail. Under such circumstances the confidential relation that the statute should protect, does not exist. The application of the principle is illustrated in the case of *Nesbit v. The People*.<sup>3</sup> This was a prosecution for murder, the defense being insanity. Upon motion of the attorney of the accused and with the consent of the district attorney, the trial court appointed a physician of standing to make an examination of the accused and to testify on the trial as to his mental condition. The supreme court in sustaining the trial court in overruling an objection on the part of the defendant to the testimony of the physician on the ground of privilege, said: "This ground of objection is not sustained by the record. The consultation was mutual, not confidential; it was not secured by the accused in his own behalf and for his own sake alone; it was

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<sup>1</sup> Ann. Code of Iowa (1897), § 4608.

<sup>2</sup> *Doran v. Cedar Rapids & M. C. R'y Co.* 117 Iowa, 442, 90 N. W. Rep. 815.

<sup>3</sup> *Nesbit v. The People*, 19 Colo. 441, 36 Pac. Rep. 221. See also, *Clark v. Kansas*, 8 Kan. App. 782.

agreed to between the prosecution and the defendant for the express purpose of enabling the physician to testify as to defendant's mental condition. It cannot be that defendant could seek and obtain such an examination at the hands of the court, and with the consent of the prosecution, with the privilege of introducing the testimony if the result of the examination should be favorable to him, and yet reserve to himself the power of excluding the testimony if it should be unfavorable."

It is apparent that the prohibition of the statutes applies only to information that the physician has acquired while attending the patient in a professional capacity and not to information obtained by him in any other way. If it happen, therefore, that a physician has attended and prescribed for a person professionally and that he has also seen the person at various times when he was not in attendance for professional purposes, he may testify as to the mental condition of the person, provided that in testifying he excludes from his mind any information that he has obtained in regard to the condition of the person while acting professionally, and confines his answers to such information as he has obtained on other occasions.<sup>1</sup> Of course, in such a case it might, and perhaps, generally would be impossible for the physician to say that his opinion was based entirely upon information received when he was not acting professionally. If he is not able to say this, his testimony should not be received.<sup>2</sup> In case a physician calls upon a patient for the purpose of collecting a bill for past services, he may testify as to what appeared to be the condition of the person at the time, the call for the purpose indicated not being such a one as would raise or continue the relation of physician and patient.<sup>3</sup> So if a physician examines a person simply for the purpose of satisfying himself as to the capacity of the person to make a will, the relation of physician and patient is not raised.<sup>4</sup> It would be otherwise, however, if the physician while making the examination should converse with the person upon the subject of his health in such a way as to lead him to suppose that the examination was for the purposes of treatment. If the visit of a physician to a person is of such a

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<sup>1</sup> *Fisher v. Fisher*, 129 N. Y. 654; in *Re Loewenstine's Estate*, 2 Misc. (N. Y.), 323, 21 N. Y. Supp. 931.

<sup>2</sup> In *the Matter of Darragh*, 52 Hun. (59 N. Y. S. C.), 591.

<sup>3</sup> *Bower v. Bower*, 142 Ind. 194, 41 N. E. Rep. 523.

<sup>4</sup> In *the Matter of Freeman*, 46 Hun. (53 N. Y. S. C.) 458.

nature as to lead the person to suppose that it is made for professional purposes, or if the person visited regards the physician as his medical adviser at the time, the relation of confidence that it is the policy of the statute to protect exists, and the physician cannot testify as to information gained at the time of the visit.<sup>1</sup>

The statutes under consideration do not prohibit the physician from speaking as a witness in regard to everything connected with his professional visits or the condition of his patient. The inhibition of the statute is usually confined to such matters as it is necessary for the physician to know in order that he may act for the patient. The statute in New York, for example, prohibits a disclosure of any information which the physician "acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."<sup>2</sup> The statute in Michigan forbids a disclosure of any information which the physician "may have acquired in attending any patient in his professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."<sup>3</sup> The language of the statute that is descriptive of the knowledge that is protected, is substantially like the foregoing in most of the states. The construction, however, that has been put upon the clause has not always been the same. The court of appeals of New York has given to the statute of that state a strict construction in this regard, the reasoning being that as the rule of exclusion did not exist at common law and is entirely the creature of statute, "it should not . . . be made broader by construction than the language of the statute plainly requires." "Before information can be excluded under this statute," says this court, "it must appear that it was such as the physician acquired in some way while professionally attending a patient; and it must also be such as was necessary to enable him to prescribe as a physician or to do some act as a surgeon. It is not sufficient to authorize the exclusion that the physician acquired the information while attending his patient; but it must be the necessary information mentioned. If the physician has acquired any information which was not necessary to enable him to prescribe, or to act as a surgeon, such information he can be compelled to disclose, although

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<sup>1</sup> *E. Patterson & Son v. Cole* (Kans.), 73 Pac. Rep. 54.

<sup>2</sup> 1 *Stover's New York Ann. Code of Civil Procedure* (1902), § 834.

<sup>3</sup> 3 *Mich. Comp. Laws* (1897), § 10181.

he acquired it while attending the patient; and before the exclusion is authorized, the facts must in some way appear upon which such exclusion can be justified. . . . It is not incumbent on the party who seeks information from a physician who has been in attendance upon a patient, to show that the information was not acquired as specified in the statute, but the party objecting must in some way make it appear, if it does not otherwise appear, that the information is within the statutory exclusion. It will not do to extend the rule of exclusion so far as to embarrass the administration of justice. It is not even all information which comes within the letter of the statute which is to be excluded. The exclusion is aimed at confidential communications of a patient to his physician, and also such information as a physician may acquire of secret ailments by an examination of the person of his patient. The policy of the statute is to enable a patient, without danger of exposure to disclose to his physician all information necessary for his treatment."<sup>1</sup> In this case it was held to be error to exclude the testimony of a physician as to whether or not a patient was cured when he left his hands and as to the health of the patient at a time subsequent to his treatment of him, it appearing that he had seen the patient frequently after he had ceased treating him, and there being nothing in the evidence to show that any information that he might disclose had been necessary to enable him to make his prescriptions.<sup>2</sup> A similar ruling has been made by the supreme court of Michigan. In a suit for personal injuries, the defendant produced as a witness a physician who had treated plaintiff subsequent to the time when she claimed to have been injured, and proposed to prove by him an admission by the plaintiff of the existence of the injury before the time when it was alleged to have been caused. The objection that the testimony was prohibited by statute was sustained by the trial court, but the supreme court held this to be error, on the ground that it did not appear that it was information that was necessary in order that the physician might prescribe for his patient. In the course of the opinion in the case the supreme court suggested that "so far as practicable the courts ought to see to it that the statute is not used as a mere guard against exposure of the untruth

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<sup>1</sup> *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 569, 570, 571.

<sup>2</sup> See, also, *Herrington v. Winn*, 60 Hun. 235 (67 N. Y. S. C.); *People v. Schuyler*, 106 N. Y. 298. But in the case of *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, the court seems to favor a more liberal construction.

of a party, and that the rule intended as a shield is not turned into a sword."<sup>1</sup> The supreme court of Kansas has held that a statement made by an injured person to his surgeon as to the position that he occupied immediately before the injury, would not be privileged, as it could not be regarded as within the inhibition of the statute. "The statute," says the court, "does not cover communications made by the patient other than those that relate to the disease or ailment for which the physician was called to prescribe, or the surgeon to treat. The declarations inquired about in this case did not relate to the physical ailment" of the party, "but were with reference to the circumstances preceding the injury. They were not of a confidential character, and were not necessary to enable the doctor to prescribe, or to perform any professional duty for him as a surgeon."<sup>2</sup> And yet it may be suggested that in case of an accident the surgeon's diagnosis of the character and extent of the injury, and his treatment of the case, might depend very much upon the position of the party just before and at the time of the accident. It would seem as though all the facts connected with the injury, so far as they could be ascertained, would be regarded by the surgeon as information necessary to enable him to accomplish the best results. The way in which an accident occurs, would, without doubt, generally be regarded as a part of the medical history of the case. And it has been held by the supreme court of Iowa, that where a person injured upon a railroad, in response to a question by the company's surgeon who was in attendance upon him professionally, as to how the accident happened, gave the surgeon the facts connected with the accident, the communication would be privileged. It appeared in this case that the information was sought in order to enable the surgeon to judge as to the company's liability, and in order to enable him to make a diagnosis of the case.<sup>3</sup>

The tendency of the courts in most of the states at the present time is undoubtedly in favor of extending the protection of the

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<sup>1</sup> *Campau v. North*, 39 Mich. 606. In a subsequent case the supreme court of Michigan suggests that "all disclosures by the patient to his physician respecting his ailments are privileged, whether they are necessary to enable the doctor to prescribe for him as a physician or not." *Briesenmeister v. Knights of Pythias*, 81 Mich 525, 531.

<sup>2</sup> *Kansas City, Ft. Scott & M. R. Co. v. Murray*, 55 Kans. 336, 40 Pac. Rep. 646. See also, *DeJong v. Erie R. Co.*, 43 N. Y. App. Div. 427.

<sup>3</sup> *Raymond v. The Burlington, Cedar Rapids & Northern R'y Co.*, 65 Iowa, 152. (e)

statute so as to include every communication that passes between patient and physician that may possibly have a bearing upon the treatment, and of recognizing a presumption that all information sought by the physician, or communicated to the physician by the patient voluntarily, is information necessary to the proper treatment of the case. These statutes have been passed for the protection of the patient, and in order that their evident purpose may be accomplished, it is necessary that the shield of the statute should, in the first instance at all events, cover every answer that the patient may give to questions from the physician, and all information that comes to the physician through his examination of the patient. The fact that the information is called for by the physician, is an indication to the patient that it is thought important by the physician for professional purposes, and it should be protected as important, even though it may not be so as a matter of fact. The relation between physician and patient is such that the former has no right to call for information for other than professional purposes, and if he does, the protection of the statute should be accorded to it. This is the reasoning of the courts that favor a liberal construction with a view of carrying out the evident intention of the legislation. In an Indiana case, where a railroad company sought to show by a physician who had treated plaintiff for injuries received, as he claimed, through the negligence of the company, that the plaintiff had said, in answer to questions, from the physician, that the company was not to blame for the accident, as he had tried to get off the train before it stopped, and slipped off the step, the court rejected the testimony on the ground that the communication was privileged. In sustaining the ruling the supreme court gives expression to the liberal view in regard to this matter. "The physician," says the court, "had no business to interrogate his patient for any purpose or object other than to ascertain the nature and extent of the injury, and to gain such other information as was necessary to enable him to properly treat the injury and accomplish the object for which he was called professionally, and such communications are privileged, and he cannot disclose them. If a physician took advantage of the fact of being called professionally, and while there in that capacity made inquiries of the injured party concerning matters in which he had no interest or concern professionally, or for the purpose of qualifying himself as a witness, he cannot be permitted to disclose the information received. The patient puts himself in the hands of his physician;

he is not supposed to know what questions it is necessary to answer to put the physician in possession of such information as will enable the physician to properly treat his disease or injury, and it will be conclusively presumed that the physician will only interrogate his patient on such occasions as to such matters and facts as will enable him to properly and intelligently discharge his professional duty, and that the patient may answer all questions propounded which in any way relate to the subject or to his former condition, with the assurance that such answers and communications are confidential, and cannot be disclosed without his consent."<sup>1</sup> In a recent case the supreme court of Missouri gives to the statute of that state a liberal construction. "We take it," says the court, "that the physician or surgeon must, as a general rule, under the statute, determine for himself whether the information acquired by him from his patient is necessary for him to prescribe for such patient, and in the absence of some showing to the contrary, . . . the presumption must be indulged that the information in question was necessary for that purpose; otherwise he would not desire it. To rule otherwise, would be to usurp the prerogative of a physician learned in his profession, which we have no inclination or right to do."<sup>2</sup>

It is probably correct to say that, under the more recent rulings, whatever is communicated to the physician by the patient, and whatever is learned by the physician through his examination of the patient, while the professional relation exists, is privileged, if it would ordinarily be regarded from the medical point of view as information necessary to a comprehensive understanding of the case, even though some part of the information may not have been absolutely necessary for the proper treatment of the case.<sup>3</sup>

The statutes usually in terms extend their protection to information that the physician may have acquired while attending the patient in a professional capacity. And the courts have very generally, and perhaps without exception, held that information gained

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<sup>1</sup> *The Pennsylvania Company v. Marion*, 123 Ind. 415, 421, 422. See also, *Heuston v. Simpson*, 115 Ind. 62.

<sup>2</sup> *State v. Kennedy*, 177 Mo. 98, 75 S. W. Rep. 979.

<sup>3</sup> See, in addition to cases in notes 1 and 2, *Kling v. The City of Kansas*, 27 Mo. App. 231; *In re will of Bruendl*, 102 Wis. 45; *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185, 194; *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 380, 381.

through seeing or examining the patient, is quite as much within the protection of the statute as information communicated by the patient to the physician. "We do not understand," says the supreme court of Michigan, in commenting upon the statute, "the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege, whatever in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."<sup>1</sup> In a few of the states the statutes prohibit the disclosure of matter *communicated* to the physician by the patient. But the courts in such states, so far as they have passed upon the question, have, in obedience to the doctrine of liberal interpretation, held that the inhibition of the statute extends to whatever the physician has learned by examination and observation, as well as to the information communicated to him by the patient. "Although the statute of this state," says the supreme court of Iowa, "uses the word 'communication,' it means much the same as the word 'information' in the statutes of other states. . . . The prohibition of our statute refers, not merely to verbal communications, but to those of any kind by which information of the character of that specified in the statute is imparted."<sup>2</sup>

The privilege arising out of this legislation is the privilege of the patient. The statutes have been enacted for his protection. It logically follows, therefore, that he may, if for any reason he desires to do so, waive the protection that has been extended to him. Some of the statutes provide expressly that the privilege exists unless waived by the patient. Others, and perhaps most of them, are silent in regard to the matter of waiver. But the right of waiver undoubtedly exists independent of any statutory provision in regard to it.<sup>3</sup> "The statute," says the supreme court of Michigan, "is

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<sup>1</sup> *Briggs v. Briggs*, 20 Mich. 34; *Fraser v. Jennison*, 42 Mich. 206, 224, 225; *Briesenmeister v. Knights of Pythias*, 81 Mich. 525, 531; *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185; *Springer v. Byram*, 137 Ind. 15; *Heuston v. Simpson*, 115 Ind. 62; *Gartside v. Conn. Mut. Life Ins. Co.*, 76 Mo. 446; *Prader v. Nat. Masonic Accident Association*, 95 Iowa 149; *McGowan v. Supreme Ct.*, etc., 104 Wis. 173; *Shafer v. Eau Claire*, 105 Wis. 239.

<sup>2</sup> *Prader v. National Masonic Accident Association*, 95 Iowa 149, 158. See, also, *Williams v. Johnson*, 112 Ind. 273.

<sup>3</sup> *The Penn. Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 100, 101; *Davenport v. The City of Hannibal*, 108 Mo. 471, 18 S. W. Rep. 1122; *Blair v. The Chicago & Alton R. Co.*, 89 Mo. 334, 383; *Grand Rapids & Indiana R. Co. v. Martin*, 41 Mich. 667; *Storrs v. Scougale*, 48 Mich. 387; *Fraser v. Jennison*, 42 Mich. 206; *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56.

one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is only a question of privilege, and such communication are on the same footing with any other privileged communication which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned."<sup>1</sup> The privilege may be waived on the trial by the attorney of the patient. In the conduct of a trial the attorney stands in the place and stead of his client, and may do what his judgment dictates in regard to claiming or conceding privileges.<sup>2</sup> If the patient calls the physician as a witness, he thereby waives his privilege under the statute.<sup>3</sup> And if a person has been attended by two physicians, he waives his privilege as to the testimony of each by calling upon one of them as a witness. A party cannot sever the privilege, and waive it in part and retain it in part. If the privilege be waived at all, it then ceases to exist. By calling one of the physicians the party makes public what before was private and confidential. In speaking of such a waiver, the court of appeals of New York says: "It amounted to a consent" on the part of the patient "that all who were present at the interview might speak freely as to what took place. The seal of confidence was removed entirely, not merely broken into two parts and one part removed and the other retained."<sup>4</sup> In the absence of a definite requirement in the statute that the waiver be express, it may, according to some authorities, be implied. For example, the failure of a party entitled to the privilege to object to the testimony of the physician who has attended him, may be regarded as an implied consent to his testifying. "The privilege given by the statute," says the supreme court of California, "is personal to the patient, and may be waived by him. It is waived when he calls the physician himself as a witness, or when he permits him to give his testimony without making any objection thereto. If the patient once consents to his testifying, he cannot, after the testimony has been given, revoke the consent and ask to have it excluded."<sup>5</sup> "There are bounds," says the court of appeals of New York, "to the

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<sup>1</sup> *Grand Rapids & Indiana R. Co. v. Martin*, 41 Mich. 667, 671.

<sup>2</sup> *Alberti v. New York, Lake Erie and Western R. Co.*, 118 N. Y. 77.

<sup>3</sup> *Alberti v. New York, Lake Erie and Western R. Co.*, 118 N. Y. 77; *Lissak v. Crocker Estate Company*, 119 Cal. 442.

<sup>4</sup> *Morris v. New York, Ontario and Western R'y Co.*, 148 N. Y. 88; but see *Pennsylvania Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92.

<sup>5</sup> *Lissak v. Crocker Estate Company*, 119 Cal. 442, 445, 446.

enforcement of the statutory provisions which will not be disregarded at the instance of a party who, being entitled to their benefit, has waived or omitted to avail himself of them. It is perfectly true that public policy has dictated the enactment of the code provisions by which the communications of patient and client are privileged from disclosure; but the privilege must be claimed, and the proposed evidence must be seasonably objected to. . . . We do not think that the rule of the statute goes further than to stamp such communications as confidential, and to protect them from disclosure, when objected to, unless the privilege has been competently waived. The rule does not prohibit the examination of such classes of witnesses; but it prohibits the evidence of the character described from being given in the face of an objection.”<sup>1</sup> The supreme court of Michigan has announced the same doctrine. “The privilege must be claimed,” says the court, “before the testimony is admitted, or it ceases to be a privilege, and is waived where no objection is made to the introduction of the testimony. It is a personal privilege.”<sup>2</sup>

Yet the circumstances may be such as to require the physician to refuse to testify excepting by direction of the court. If the patient concerned is not a party to the litigation and is not, therefore, so situated as to be able to interpose an objection, it is undoubtedly both the professional and legal duty of the physician to refuse to disclose confidential matter until directed to do so by the court. The supreme court of Michigan, speaking through Justice COOLEY, has declared this doctrine emphatically in a case in which an attempt was made to impeach the character of one of the parties through the testimony of a physician in regard to his treatment professionally of another person not a party. “This evidence,” says Justice COOLEY, “ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it.” And after quoting the statute, he continues: “Every reputable physician must know of the existence of this statute; and he must know from its very terms as well as from the obvious reasons underlying it, that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be ‘allowed’ to

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<sup>1</sup> *Hoyt v. Hoyt*, 112 N. Y. 493, 514, 515.

<sup>2</sup> *Briesenmeister v. Knights of Pythias*, 81 Mich. 525, 534; *Lincoln v. City of Detroit*, 101 Mich. 245.

violate; a privilege is guarded which does not belong to him but to his patient, and which continues indefinitely and can be waived by no one but the patient himself. . . . What was done in this case may have been thoughtlessly done; but if a physician is found disposed to violate both the law of the land and the precepts of professional ethics by making such a disclosure, and if counsel invite him to do so by their questions, the commissioner, in the case of so plain a disregard of the law to the prejudice of a third party, may well decline to be an instrument of the wrong, at least until he can take the opinion of the circuit judge on the subject."<sup>1</sup>

The protection of the statute is not removed by the death of the patient. "There is no more reason," says the court of appeals of New York, "for allowing the secret ailments of a patient to be brought to light in a contest over his will than there is for exposing them in any other case where they become the legitimate subject of inquiry."<sup>2</sup> But it has been held in several states that the privilege conferred by the statute may be waived by the personal representatives of the deceased patient. What the patient may do in his life-time, "those who represent him after his death may also do for the protection of the interests they claim under him."<sup>3</sup>

The field of the medical expert is co-extensive with the field of medical investigation, learning and experience. He may speak upon any subject that is within the domain of medical science. His testimony, which is usually in the form of opinions or conclusions, may be based upon his observation or upon his personal examination of the subject matter of inquiry, or it may be based upon a hypothetical case. If his examination, or any part of it, is by means of the hypothetical question, the hypothetical statements should find support in the evidence adduced upon the trial. If the medical expert could always testify from observation or from his personal experience in the case, the question of what should be the

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<sup>1</sup> *Storrs v. Scougale*, 48 Mich. 387, 395, 396.

<sup>2</sup> *Renihan v. Dennin*, 103 N. Y. 573, 579; *Westover v. The Aetna Life Ins. Co.* 99 N. Y. 56; *Thompson v. Ish*, 99 Mo. 160. 17 Am. St. Rep. 552 and cases cited in note p. 569; *In re Flin*<sup>t</sup> 100 Cal. 391, 34 Pac. Rep. 863; *Denning v. Butcher*, 91 Iowa, 425; *Heuston v. Simpson*, 115 Ind. 62.

<sup>3</sup> *Fraser v. Jennison*, 42 Mich. 206, 225; *Denning v. Butcher*, 91 Iowa, 425; *Shuman v. Supreme Lodge Knights of Honor*, 110 Iowa, 480; *Morris v. Morris*, 119 Ind. 341. In *New York* the waiver by representatives of the deceased patient was not formerly permitted, but is now provided for by statute. 1 *Stover's New York Ann. Code*. (6th ed.) § 836. See also, *Holcomb v. Harris*, 166 N. Y. 257.

attitude of court and jury toward this class of testimony, would not be one of difficulty, but under present conditions, when so much of the expert testimony, both upon medical and other subjects, has simply a hypothetical basis, it is one upon which courts of last resort have furnished quite a variety of opinion.

In the consideration of this question, we should not lose sight of the object of expert testimony, which is to furnish information to jurors upon special subjects with which they are not supposed to be familiar for use by them in reaching a conclusion upon the facts. What the expert has said, is to be used by the jurors as a guide simply. "The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors."<sup>1</sup> It follows, therefore, that while the testimony of experts should receive full consideration, it should not control the jurors in opposition to their own judgment. Great weight should undoubtedly be given to expert opinions that are honestly and candidly expressed, but they should never be blindly followed. Their controlling force should be governed by the judgment of the jury as informed by all the testimony submitted, including expert opinions, and by their experience and general knowledge. "It is true," says the supreme court of Indiana, "that in a great variety of cases, the opinions of scientific men or experts are admissible in evidence, but it does not therefore follow that they are authoritative, or that in doubtful cases they should control the jury. Where such opinions are given in evidence, they should be received and treated by the jury like any other evidence in the case. Such weight should be given them and only such as the jury may think them entitled to. It is the peculiar province of the jury to judge of the credibility of witnesses and the weight that should be attached to their evidence, and this rule . . . applies to the opinions of scientific men as well as to the testimony of any other class of witnesses."<sup>2</sup> In this case the jury had been instructed that in questions involving science and skill, the opinions of experts should be regarded as authoritative, and that in doubtful cases they should control. This was held to be error. The trial court cannot properly single out expert testimony, and by express and particular reference to it magnify its importance. Thus, it would be improper in an action for professional services, where the value of such services has been estimated by professional wit-

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<sup>1</sup> *Head v. Hargrave*, 105 U. S. 45, 50.

<sup>2</sup> *Humphries v. Johnson*, 20 Ind. 190.

nesses, for the trial court to instruct the jury that "such witnesses are supposed to be better qualified to put a value upon such services than the jury;" that "such testimony is the guide of the jury in finding the amount justly due," and that they must "take the testimony of these witnesses and be governed by it in finding the value of the services rendered." In holding such instructions to be error, the supreme court of Kansas says: "It is not for the court to instruct the jury as to what part of the testimony before them shall control their verdict, but the jury must weigh all the testimony before them, decide as to its credibility and as to the weight which should be given to it in making up the verdict. . . . The jury cannot be required by the court to accept, as matter of law, the *conclusions* of the witnesses instead of their own. . . . The instruction substitutes the judgment of the witnesses for the judgment of the individual jurors; while the true theory of jury trials regards the opinion of such witnesses as *facts*, to be considered and weighed like other facts and circumstances in the case."<sup>1</sup> According to this case, then, and others cited in the note, the opinions of the expert, when allowed, become *facts* in the case, and if they are to control it must be, not because of their source, but because they appeal to the judgment of the jury as determining factors; and it is error for the trial court to emphasize in its instructions the value of such testimony.

The conclusion suggested in the last paragraph, however, has not, in some states, been recognized and applied to its full extent.

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<sup>1</sup> *Anthony v. Stinson*, 4 Kans. 211, 221, 222. See also, *People v. Vanderhoof*, 71 Mich. 158, 173, 174; *C., B. & Q. R. Co. v. Gregory*, 58 Ill. 272, 285; *Carpenter v. Calvert*, 83 Ill. 62, 70, 71; *Tatum v. Mohr*, 21 Ark. 349, 353, 354; *Williams v. State*, 50 Ark. 511, 519, 520; *Guetig v. State*, 66 Ind. 94, 32 Am. St. Rep. 99; *Leitensdorfer v. King*, 7 Colo. 436; *Choice v. State*, 31 Ga. 424, 481; *Ryder v. State*, 100 Ga. 528, 533, 534, 62 Am. St. Rep. 334; *Moratzky v. Wirth*, 74 Minn. 146. In this last case, while it was held that "the ordinary function of experts is to assist the jury by their superior knowledge in reaching a correct conclusion from the facts in testimony before them," and that "their opinions are not, as a rule, conclusive upon the jury, but mere items of evidence," yet it was suggested that "in a case where the evidence and the facts to be determined therefrom are undisputed, and the case concerns a matter of science or specialized art, or other matter of which a layman can have no knowledge, the jury must base their conclusions upon the testimony of experts." See also, *Ewing v. Goode*, 78 Fed. Rep. 442. In *McLean v. Crow*, 88 Cal. 644, it was held that it would not be error for which a judgment should be reversed, for the court to refuse to add words of caution in regard to expert testimony, although it would not have been improper for the court to have done so, after having instructed the jury that the opinions of experts need not necessarily control, but should be considered together with all the testimony in the case.

The supreme court of North Carolina, for example, has held that it is not error for the trial court to charge that the law "attaches peculiar importance to the opinion of medical men, who have the opportunity of observation, upon a question of mental capacity, as by study and experience in the practice of their profession, they become experts in the matter of bodily and mental ailments."<sup>1</sup> It should be observed that the theory upon which this instruction was held to be proper, was that it was given with reference to the testimony of a physician who had personally examined the case, and whose conclusions were based upon that examination, and not in regard to opinions predicated upon the testimony of others or upon hypothetical questions. "The opinion," says the court, "of a well instructed and experienced medical man upon a matter within the scope of his profession, and based upon personal observation and knowledge, . . . ought to be carefully considered and weighed by the jury in rendering their verdict; and this substantially is the comment of the court."<sup>1</sup> In a previous case the same court had held a charge not open to criticism because the trial court had expressed the opinion that the testimony of an intelligent and well educated physician, based upon the facts developed upon the trial, as to the way in which a deceased person had come to his death "ought to have great weight with the jury," the court immediately adding, as a part of the instruction: "It is true the opinion of experts ought to have weight with the jury, as they are familiar with these questions, but the jury are not concluded by their opinion; if the evidence justifies, they may find against such opinions; they must find the fact upon the whole evidence."<sup>2</sup> The supreme court concluded that the charge as a whole was such as to give the jury a correct view of their duty in regard to the expert testimony.

But while it is improper for the trial court in its instructions to the jury to give special prominence to the testimony of experts, the opposite extreme of disparagement should be avoided. It has been held to be error for the court to discredit the testimony of experts by charging that expert opinion is frequently unsatisfactory and in many instances unreliable, giving reasons, or that it is not evidence

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<sup>1</sup> *Flynt v. Bodenhamer*, 80 N. C. 205.

<sup>2</sup> *State v. Owen*, 72 N. C. 605.

of as high a grade as the testimony of credible witnesses in regard to facts, or that it should be received and weighed with caution.<sup>1</sup>

The conservative view is undoubtedly the correct one, and it may be summarized as follows: that the weight to be given to the testimony of experts is a question to be determined by the jury; that such testimony should be considered by them as other testimony is

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<sup>1</sup> See *Estate of Blake*, 136 Cal. 306; *Gustafson v. Seattle Traction Company*, 28 Wash. 227; *Nelson v. McLellan*, 31 Wash. 208, 60 L. R. A. 793; *People v. Seaman*, 107 Mich. 348, 61 Am. St. Rep. 326; *Louisville, New Orleans and Texas R. Co. v. Whitehead*, 71 Miss. 451, 42 Am. St. Rep. 472; *Atchison, Topeka and Santa Fe R. Co. v. Thul*, 32 Kans. 255, 49 Am. Rep. 484; *State v. Hundley*, 46 Mo. 414; *Langford v. Jones*, 18 Oregon, 307. The supreme court of Indiana has held it to be error as underrating too much the value of the testimony of experts as a class for the trial court to charge the jury that "the opinions of experts are not so highly regarded now as formerly; for, while they sometimes afford aid in the determination of facts, it often happens that experts can be found to testify to any theory, however absurd; and they frequently come with biased minds, prepared to support the cause in which they are embarked. I do not wish to be understood that the witnesses called in this case are biased. You are the judges of that matter." *Eggers v. Eggers*, 57 Ind. 461, 463, 464. In this case the trial court was further criticised for saying to the jury that "the testimony of experts is usually of very little value in determining the sanity or insanity of a party," the supreme court suggesting that the contrary seems to be the rule. Yet the supreme court of Tennessee has held that it is not error for the trial court in effect to advise the jury that expert testimony should be received with caution. *Wilcox v. State*, 94 Tenn. 106, 112, 113. And the supreme court of Iowa has held that it is not error for the trial court in a case in which the testimony of experts has been introduced to charge the jury that while it is proper for them to consider such evidence and to give it such weight as they may think it justly entitled to, "yet it is proper to remark that it is of the lowest order of evidence, or evidence of the most unsatisfactory character." Before giving this instruction, the court had said to the jury that it would be for them to determine how much weight should be given to the expert testimony, after taking into consideration the amount of skill possessed by the witnesses. To the objection of counsel that the trial court by the instruction usurped the province of the jury in determining the weight to be given to the evidence in question, the supreme court said: "It is surely proper for the court to announce to the jury rules sanctioned by reason and experience to enable them to rightly weigh the evidence submitted in the case. . . . The instruction attempts nothing different. It does not take from the jury the duty of determining the weight to which the expert evidence is entitled, but simply gives them rules for the proper discharge of that duty." *Whitaker v. Parker*, 42 Iowa 585. It should, perhaps, be suggested that the expert testimony in this case was in regard to handwriting, and that courts rarely look upon such testimony with favor. See, also, *State v. Hockett*, 70 Iowa 442; *United States v. Pendergast*, 32 Fed. Rep. 198, 201. But see the subsequent cases of *Brush v. Smith*, 111 Iowa 217, 220, and *State v. McCullough*, 114 Iowa 532, 55 L. R. A. 378, wherein the correctness of such cautionary and disparaging instructions is recognized only "in a certain class of cases, as where the evidence relates to the genuineness of handwriting," and the doctrine is announced that in most cases the jury should be permitted to receive expert opinions like other evidence and consider them without detraction by the court.

considered, and such importance should be attached to it as the testimony itself seems to warrant, when viewed in connection with all the facts and circumstances developed upon the trial; that while jurors should never surrender their judgment to that of the expert or give a controlling influence to the opinions of the scientific witness simply because they are the opinions of such a witness, they should not, on the other hand, dismiss such testimony without consideration, as belonging to a suspicious class and as being rarely entitled to credit; that it is the duty of the jury to consider carefully all the testimony submitted, both ordinary and expert, keeping in mind that the object of the latter is to furnish to them aid in their deliberations by informing them in regard to matters that lie outside the domain of ordinary experience. A charge embodying the substance of the foregoing would, probably, according to the general consensus of opinion, be proper, and some such instructions should usually be given.<sup>1</sup> It is also proper for the trial court to advise the jury that in estimating the value of expert testimony, the standing of the expert, his opportunities for becoming proficient in the field of investigation that he claims as his specialty, and the means that have been open to him for gaining knowledge in regard to the case upon trial, should be taken into consideration.<sup>2</sup> It should be observed, however, that it is the skill and knowledge actually possessed by the expert, as shown by the evidence, not the skill and knowledge that he professes to possess, that should be considered by the jury. Thus, it has been held to be misleading error for the trial court to instruct the jury that "the testimony of witnesses who profess special skill and knowledge, given upon facts

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<sup>1</sup> See the Conqueror, 166 U. S. 110, 133; *Laffin v. Chicago W. & N. R. Co.*, 33 Fed. Rep. 415, 422; *Carter v. Baker*, 1 Sawyer 512, 525; *Cunec v. Bessoni*, 63 Ind. 524; *Goodwin v. The State*, 96 Ind. 550, 561, 562; *Epps v. State*, 102 Ind. 539; *Hull v. St. Louis*, 138 Mo. 618, 43 L. R. A. 753 and note; *Hoyberg v. Henske*, 153 Mo. 63, 55 S. W. Rep. 83; *Moratzky v. Wirth*, 74 Minn. 146, 76 N. W. Rep. 1032; *The State v. Bailey*, 4 La. Ann. 376; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. Rep. 488; *People v. Barberi*, 47 N. Y. Supp. 168, 173, 174; *Fox v. Peninsular White Lead and Color Works*, 84 Mich. 676; *Olson v. Village of Manistique*, 110 Mich. 656, 68 N. W. Rep. 986; *Williams v. State*, 50 Ark. 511, 520; *Kennedy v. Upshaw*, 66 Texas 442, 454; *Alabama Great South. R. Co. v. Hill*, 93 Ala. 514.

<sup>2</sup> *Bennison v. Walbank*, 38 Minn. 313, 37 N. W. Rep. 447; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. Rep. 83; *Aetna Life Ins. Co. v. Ward*, 140 U. S. 76; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Gay v. Union Mut. Life Ins. Co.*, 9 Blatch. 149; *State v. Hinkle*, 6 Iowa 380; *State v. Hockett*, 70 Iowa 442, 447; *State v. Miller*, 9 Houst. (Del.) 564; *Wells v. Leek*, 151 Penn. 431; *People v. Kemmler*, 119 N. Y. 580; *Commonwealth v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Ebos v. State*, 34 Ark. 520.

stated to them, is subject to the same test as to credibility as the evidence of other witnesses, except that" the jury "should consider the degree of skill and knowledge professed by the witness, so far as the evidence shows, and estimate the value of their opinions accordingly." In holding this instruction to be improper as tending to mislead the jury, the supreme court of Indiana said: "The value of the opinion of an expert does not depend on the skill and knowledge professed, but upon the skill and knowledge actually possessed by the witness."<sup>1</sup>

While it is undoubtedly the law that the jury may reject entirely expert testimony, and decide the case upon other testimony submitted, if in their judgment such a course is the proper one, yet where the only testimony upon a given issue is of the expert kind, it would be improper to instruct them that they might disregard the testimony of the experts, and use their own judgment in determining the question. For example, in an action by a physician for compensation for professional services, where the only testimony was that of experts, and where such testimony was in favor of the treatment given and of the right to recover, it was held to be error for the court to instruct the jury in substance that they were "at liberty, if not satisfied with the testimony of the experts, to use their own judgment on the question of value." In so holding the supreme court of Michigan said: "There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind, from persons knowing something about such value. . . . There is no rule which would allow the jury to entirely ignore the testimony and at the same time to form an independent conclusion without testimony upon a matter which required proof beyond their conjectures or their opinions. . . . Where all the testimony in the case is in favor of the treatment pursued, and the question is one of medical skill which can only be tested by those familiar with such matters, it is error to let the jury draw adverse conclusions, which could only be based on their unprofessional notions of how such injuries should be treated."<sup>2</sup>

The testimony of the family physician, particularly where the question is as to the mental condition of a member of the family who has been for a long time treated by him, is undoubtedly

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<sup>1</sup> *Snyder v. The State*, 70 Ind. 349.

<sup>2</sup> *Wood v. Barker*, 49 Mich. 295; See, also, *Getchell v. Hill*, 21 Minn. 464.

entitled to greater weight than the testimony of the physician who has never seen the case, and who gives his opinion in answer to hypothetical questions.<sup>1</sup> And this may properly be stated to the jury by the trial court, if stated in a general way. The danger is that a charge upon the subject may point out so specifically, as entitled to weight, the testimony of a particular physician that discredit will thereby be cast upon the testimony of other expert witnesses. For example, the supreme court of appeals of West Virginia has held that a trial court properly refused to instruct a jury that the testimony of the family physician, naming him, who attended the testator was entitled to great weight, suggesting that such an instruction would amount to a special direction to the jury that the testimony of a particular physician was entitled to great weight, which would be error. It was held, however, by this court that the following instruction given by the trial court, "that the evidence of physicians, especially those who attended the testator and were with him during the time it is charged he was of unsound mind, is entitled to great weight," was correct.<sup>2</sup>

In the matter of instruction to the jury as to the way in which they should deal with expert testimony, trial courts are undoubtedly often misled by the opinions of appellate courts as to the value of this kind of testimony. Courts of last resort, as has been hereinbefore shown, frequently in their opinions indulge in derogatory suggestions as to the character of expert testimony and as to the weight that should be accorded to it; and at times they unduly magnify its importance. Trial courts, through such opinions, often become imbued with extreme notions, and they not infrequently give expression to them in their instructions to jurors. They often fail to recognize that, while the appellate court may without prejudice to the rights of parties, as it is not giving instructions for the guidance of jurors, discredit the expert and his theories, or express the opinion that his testimony should, in certain cases, exercise a controlling force, such freedom in criticism or commendation by the trial courts is improper, for the reason that it is liable to mislead those who must finally pass upon the weight to be given to the evidence. Undoubtedly much error and confusion would be avoided if appellate courts would indicate that their com-

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<sup>1</sup> *Baxter v. Abbott*, 7 Gray 71, 79; *Jarrett v. Jarrett*, 11 W. Va. 584; *Beverly v. Walden*, 20 Gratt. (Va.) 147, 158, 159; *Ward v. Brown*, 53 W. Va. 227, 44 S. E. Rep. 488.

<sup>2</sup> *Kerr v. Lunsford*, 31 W. Va. 659, 2 L. R. A. 668, 8 S. E. Rep. 493.

ments as to the weight that should be given to expert testimony show simply their attitude toward such testimony and not their opinion of what the trial court should say to the jury upon the subject.

It may be observed in this connection that the variety of judicial opinion that we find in the books as to what the trial court may properly say to the jury in regard to expert testimony, is undoubtedly due in a measure to the fact that in some jurisdictions trial courts may express opinions upon the facts, provided that all matters of fact are finally submitted to the jury, while in others such courts are expressly prohibited by law from charging juries in regard to matters of fact.

An examination of reported cases in which the subject of expert testimony is considered, must convince one that the methods in use in connection with such testimony are subject to severe criticism. The qualifications of the expert, particularly of the medical expert, that the courts accept as sufficient, furnish but inadequate protection. Furthermore, while the question of competency is for the court, the tendency certainly is to throw the responsibility upon jurors by admitting the testimony and leaving it to them to consider the qualifications of the witness in their deliberations as to the weight to be given to the evidence. That such a course must often result in serious error is apparent. Moreover, as the result of a practice that leaves the selection of these witnesses, and in most states the amount of their compensation also, entirely in the hands of the parties, we usually have in the expert a paid advocate instead of an unprejudiced guide. Under such conditions, the trial not infrequently degenerates into a battle of the experts, in which the real issue is confused, if not entirely lost, in the attempts of the jurors to follow the scientific controversy. That the situation would be materially improved if these witnesses could be selected by the court, cannot admit of doubt. So far as the medical expert is concerned, there would seem to be little difficulty in devising a scheme by which this could be done.

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